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Citations

CASES:

STATUTES:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 70-267

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

ROBERT SCRIVENER, D/B/A AA ELECTRIC COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. Did the Court properly conclude that secret, pre-complaint statements given to the Labor Board are not equivalent to "testimony under this Act" protected under Section 8(a)(4)?

2. Should the Court's Decision denying enforcement of the Board's Decision herein be affirmed for the additional reasons contended by the Company: that the record fails to show Board jurisdiction under Section 2(6) and (7) or under Section 10(b) of the Act; that

the Board's assertion of jurisdiction against this Company (which is in a class excluded by the Board's jurisdictional standards) is arbitrary, capricious, discriminatory and a denial of due process of law; or that the findings of violations on which jurisdiction has been asserted are not supported by substantial evidence on the record as a whole?

STATEMENT OF THE CASE

A. Proceedings Before Board.

The Union[1] filed charges against the Company[2] with the Board's[3] Regional Director on March 21, 1968, accusing the Company of violating Sections 8(a)(1), (3), and (5) of the Act.[4] These unfair labor practice charges accused the Company of interference with rights of employees to join the union, refusing to bargain with the union, and discharging three employees because of their union interests or activities. (A. 169) The Company's attorney promptly denied the charges, and pointed out that the Company does not meet the Board's published jurisdictional standards. (Resp.Exh. 1, A. 3-4, 190) The Trial Examiner (A. 219), the Board (A. 273), and Petitioner's Brief herein (Pet.Brief, pp. 4-5, note 4) all now

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1. Local 453, International Brotherhood of Electrical Workers, AFL-CIO.

2. Robert Scrivener, d/b/a AA Electric Company.

3. National Labor Relations Board.

4. National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.). Sections 7 and 8(a)(1) and (4) are quoted at page 2 of Petitioner's Brief herein. Sections 8(a)(3) and (5), respectively, provide that it shall be an unfair labor practice for an employer: "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *" [with certain exceptions not here material relating to union security agreements and their enforcement]; and "(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

agree that the Company does not meet the Board's jurisdictional standards.

Although no complaint had yet been issued by the Board's Regional Director on the above charges in Case No. 17-CA-3519 (A. 169), and thus no hearing had been conducted, the Union filed an amended charge on May 13, 1968, realleging the accusations of the original charge but adding a new charge under Section 8(a)(4) and stating the following as the basis therefor (A. 173):

> "On or about April 18, 1968, the Employer terminated the employment of George Smith, Claude Saunders, Albert Wilson and Don Cockrum, *because they gave testimony in the matter of Board Case No. 17-CA-3519,* * * *." (Emphasis added)

Company counsel again wrote a letter dated May 15, 1968, to the Regional Director reiterating the lack of Board jurisdiction under its published standards, and stating the following concerning the new charge under Section 8(a)(4) (Resp.Exh. 3, A. 3-4, 193):

> "* * * the charges should be dismissed as being completely ridiculous. The charge regarding the alleged termination of April 18, 1968, could not be true as it is alleged that the employees were terminated for giving testimony in Board Case No. 17-CA-3519, and there has never been any proceeding in such matter that I know about, and if any hearings were held without notifying me, I am sure that they would be illegal. I believe that an attorney representing a party should be advised of any hearings before they are held."

Company counsel further requested the Regional Director to advise what ruling had been made concerning the allegation of lack of Board jurisdiction "as this case has

been pending for quite some time, and I think that we should be advised of your determination in this regard." (A. 193-194)

Without responding to the Company's letter, the Regional Director issued a Complaint against the Company dated May 17, 1968 (A. 180), accusing the Company of all of the violations raised in both of the above-mentioned charges. (A. 175-180) Paragraphs 5(c) and (e), and 9 of the Complaint (A. 177, 179) alleged a violation by the Company of Section 8(a)(4) of the Act with respect to the four employees who the union's charge of May 13 had claimed the Company terminated "because they gave testimony" in this same case, before any Board hearing had been held. (A. 173)

After the Trial Examiner's Decision, which held the Company did not meet the Board's published jurisdictional standards (A. 219), but held against the Company on all other issues (A. 216-249), and the Company's exceptions to these adverse findings (A. 249-272), the Board Decision of June 30, 1969 (A. 272-276) with one member not participating, and one member dissenting (A. 277), held that since the Company does not meet the Board's published jurisdictional standards (A. 273) it would not effectuate the policies of the Act for the Board to assert jurisdiction on all of the violations alleged. According to its long-established policy of limiting its jurisdiction "to enterprises whose operations had a pronounced impact upon the flow of interstate commerce", and its "jurisdictional standards [which] establish the guidelines by which the Board normally assesses such impact", and to insure "uniform administration of national labor relations policy" by concentrating its resources on "resolving labor disputes having substantial impact on commerce", the Board declined to assert jurisdiction on the "alleged independent

and unrelated violations of Section 8(a)(1), (3) and (5)." (A. 274) The Board Decision, therefore, dismissed all allegations excepting the claimed violation of Section 8(a)(4), explaining its reasons as follows (A. 275):

> "The reason is that, unlike remedying the violations of Section 8(a)(4), the remedying of the alleged violations of Section 8(a)(1), (3), and (5) has no immediate impact on the vindication of the right of an individual to resort to the Board's processes and thus provides no independent basis for asserting jurisdiction. In these circumstances, *we find that equal and effective adminstration of the policies of the Act require us to limit our exercise of jurisdiction to remedying the Section 8(a)(4) violations.*" (Emphasis added)[5]

B. Proceedings Before Eighth Circuit Court of Appeals.

General Counsel petitioned the United States Court of Appeals for the Eighth Circuit for enforcement, and the Company sought review.

Despite the above quoted language from the Board's Decision indicating that the Board decided to "limit our exercise of jurisdiction to remedying the Section 8(a)(4) violations", the General Counsel contended in its brief to the Eighth Circuit that the Board had found violations not only of Section 8(a)(4), but also of Section 8(a)(1). Assuming the Board's Decision was as contended by the General Counsel the Eighth Circuit held that Section 8(a)(4) could not be construed to encompass the discharge of employees "for giving written sworn statements to Board field examiners" since such pre-complaint investigatory statements do not constitute "testimony" as

5. Petitioner's Brief (pp. 6-7) overlooks the fact that the Board did not assert jurisdiction over violations of 8(a)(1) herein. (A. 275)

meant in that Section. The Eighth Circuit had previously so held in *NLRB* v. *Ritchie Mfg. Co.*, 354 F.2d 90, and this decision had been followed by the Sixth Circuit in *Hoover Design Corp.* v. *NLRB*, 402 F.2d 987. The Eighth Circuit also rejected General Counsel's contention that Section 8(a)(1) could provide an independent basis for enforcement of the Board's order in this case, the Court noting that this is "a case where the Board's jurisdiction to act is marginal." (A. 281-282)

In view of its denial of the General Counsel's petition for enforcement on the grounds stated above, the Eighth Circuit did not reach all of the points raised by the Company.[6]

C. The Evidence.

Since the Board declined to assert jurisdiction of any violations other than Section 8(a)(4) and consequently did not review the exceptions of the Company (A. 249-272) to the Trial Examiner's Decision on the allegations under Sections 8(a)(1), (3), and (5), we shall limit our Statement to the evidence which may be deemed relevant to the 8(a)(4) claims.[7]

(1) Company's Business and Relationship to Commerce.

The Company is an individual proprietorship engaged in residential construction, run by Robert Scrivener, its

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6. The points contained in the Company's Brief to the Eighth Circuit are summarized under Point II of our Argument, *infra*.

7. All but the first sentences of paragraphs one and three, and all of paragraph two, page 3, of Petitioner's Brief are deemed irrelevant to Section 8(a)(4) violations, as the evidence there referred to was offered and received on the 8(a)(3) and (5) theories. Since the Board and Court have never reviewed the record as a whole to see if these findings of the Trial Examiner are supported by substantial evidence, it is erroneous to assume these facts are established, as Petitioner's Brief does.

owner.[8] (A. 16, 28, 218) Scrivener himself has been a member of the Union herein or a sister IBEW local in Tulsa from 1936 until he commenced the Company in Springfield, Missouri, about three years prior to the hearing. (A. 220, 132, 133)

The Company grossed almost $69,000 during calendar 1967, and in that year purchased some $23,000 of goods and materials from the local office of Graybar Electric Company. (A. 119, 218) Graybar's local manager, Mr. Griffin, who was called by General Counsel, was permitted to testify (over the Company's objections to hearsay) as to what his Kansas City office had told him over the telephone their records in Kansas City showed, stating that the Company had purchased some $18,000 of materials and equipment from Graybar during the first quarter of calendar 1968. (A. 121) He also testified that his local records, which were not produced in evidence but which he and Counsel for General Counsel had investigated *ex parte* at his office before the hearing showed the Company had purchased $4,769.33 from his Company in 1968. (A. 122-123) Of these latter figures, which he had on an adding machine tape brought with him to the courtroom, he testified that the Company had made the following purchases of materials which he thought originated outside Missouri: six 40-watt fluorescent lamps, and two pair of pliers manufactured in Cleveland and Chicago respectively (A. 123); conduit from Pittsburgh, Pa.; couplings from Chicago; "Greenfield conduit, *this is assumptive, I think would have been Chicago*" (A. 123-124); "a quantity of Starlight fixtures manufactured in Kentucky" (A. 124); and "two items of Starlight from Kentucky and one from Lasonia in Tennessee on the fix-

8. Scrivener is not "President", as erroneously stated by Petitioner's Brief, pp. 3, 4.

tures" (A. 124). After stating that he had not had an opportunity to inspect all his records and invoices for 1968, Griffin "estimated" (A. 218, 219, 273) that about 90 percent of the Company's purchases in 1967 and 1968 "would have been manufactured outside the State of Missouri." (A. 124) The Trial Examiner elicited from the witness that about 5 percent of the stock Graybar keeps on hand is manufactured in Missouri, and 95 percent outside Missouri. (A. 124-125) Griffin admitted that the records concerning this are kept in Kansas City (A. 120-121) and it is physically impossible to tell from looking at the goods whether they come from within Missouri or from outside. (A. 125)

The Company's exceptions (A. 253, 255, 256, 269, 270-271) attacked the Trial Examiner's reliance upon these estimated double-hearsay, *ex parte*-investigation, projections for finding that the Company's business affected commerce within the meaning of Sections 2(6) and (7) of the Act. But the Board relied entirely on this testimony of Griffin to find statutory jurisdiction. (A. 273, note 1)

The Trial Examiner (A. 219), and presumably the Board, although it did not expressly rule on the point (A. 272-273), rejected the Company's argument (A. 256) that at most the relationship of the Company's business to interstate commerce was *de minimis*. The Court of Appeals, however, may have agreed with the Company's *de minimis* argument, in stating that "the Board's jurisdiction is marginal." (A. 282)

(2) Employment and Layoff Histories of Four Alleged Discriminatees.

The Company had been in business about three years prior to the hearing, engaged primarily in residential electrical construction. (A. 123) Due to the sporadic nature of the Company's work, each of the four alleged

discriminatees admitted that there had been occasional layoffs by the Company prior to March, 1968, which is when the union activities are claimed to have commenced and which is before any Board investigation of the charges filed on March 21, 1968. (A. 169)

Wesley Smith, who had worked for the Company about 19 months, admitted occasional layoffs (A. 16, 34) because of lack of work. (A. 34) These were usually at the end of the work day. (A. 31)

Albert Wilson, who had worked for the Company about one year, admits that there were occasions when he and other employees worked less than a full week, after they finished certain jobs. (A. 58, 68)

Claude Sanders, who had worked about a year (A. 77-78), testified that such layoffs had occurred "every once in awhile * * * when business was slack and they laid us off, some of us." (A. 83)

Don Cockrum testified he had worked for the Company "off and on" over a period of about three years. There had been at least five breaks in his employment during that period, part of them due to his having quit. (A. 85)[9]

(3) The Layoffs of April 18, 1968.

Respondent, Robert Scrivener, testified that the reason he laid off four employees on April 18, 1968, was lack of work, and that at that time he was not even aware they

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9. The Company filed exceptions to the Trial Examiner's failure to recognize and credit these admissions by General Counsel's own witnesses (A. 263), which corroborate Scrivener's testimony that the reason for his layoffs on April 18 was lack of work (A. 141), and that layoffs for this reason occurred in this Company during its entire three years of operations.

had talked to a Labor Board investigator. (A. 141)[10] He testified that he did not lay off these employees, or fail to recall them, because they had talked to an NLRB investigator. (A. 141) Scrivener testified that his work was exceedingly slack at this particular time. (A. 139) One reason for this was the picketing by the Union of his apartment house project.[11] In order to get the other crafts to work on the job, the project owner had required Scrivener to pull his men off the job. (A. 138, 153) This caused a 60 percent reduction in the Company's available work. (A. 138) He had laid off William Cockrum and George

10. Scrivener testified he first learned of the fact that employees had talked to the Labor Board agent from Wesley Smith, after the April 18 layoff. (A. 141) Since Smith was not recalled until May 4, the Trial Examiner inferred that this was before the April 18 layoff (A. 233-234) although it is just as possible that it was May 4 or afterwards, and Smith himself denied any interrogation by Scrivener about the Labor Board investigation. (A. 46-47)

11. The picketing of this project was by the same union which later filed the charges herein. Ray Edwards, one of the charging party's business agents, testified that he placed the picket on this job on March 15, 1968. (A. 161) This was before the union claims to have represented any of the Company's employees. (A. 162) Since Respondent Company is too small to meet the Board's jurisdictional standards, Respondent could not get Board assistance to remove this picketing and to prevent any violations of Section 8(b)(4)(B) by the Union, which is a known offender of that law. *NLRB* v. *Local 453; International Brotherhood of Electrical Workers, AFL-CIO*, 432 F.2d 965 (8th Cir. 1970), enforcing 170 NLRB No. 69 (1968). That the picketing caused an interruption of the Company's work is shown not only by Scrivener's testimony (A. 138), but by the Company's offers of proof that Lee Goings, the project owner, had complained to Business Agent Edwards of the Union about it. (A. 162-164) Although the Trial Examiner rejected the offer of proof as being a "collateral matter" not directly related to the issues of the case (A. 164), his later findings were that the Company should have made the work on the apartment house available for his employees rather than subcontracting it out to Aton Luce Company, a union contractor. (A. 239) This later finding of the Trial Examiner, in the face of his earlier refusal to permit the Company to produce evidence and cross-examine Ray Edwards concerning the Union's having caused the interruption of the Company's work by this picketing rendering it impossible for the Company to complete the job, was excepted to by the Company. (A. 254-255, 258, 260-261, 266)

Smith on May 27, 1968, for lack of work. (A. 137) William Cockrum was never recalled, due to unavailability of work (A. 139), and his layoff is no longer an issue in this case. (A. 275) Smith had been recalled on April 1 to come back and finish some houses he had started (A. 139), but which had required some work to be completed by other crafts before he could conclude. (A. 139, 155)

No testimony was adduced to show that Respondent Scrivener had any knowledge of what, if anything, the four employees may have told the Board investigator on April 17, 1968.[12]

The testimony relied on by the Trial Examiner for finding that Scrivener had knowledge of the fact that some employees had talked to the Board investigator on the night of April 17, 1968, is that of Albert Wilson and Claude Sanders.[13]

Wilson testified that the NLRB investigator took his statement along with two others on the night of April 17. (A. 64) When he went to work the next morning Wilson

12. Respondent Company filed exceptions to the Trial Examiner's failure to note this fact. (A. 263)

13. Neither of the first two employee witnesses of General Counsel (William Cockrum and Wesley Smith) gave any testimony to support the 8(a)(4) theory. (A. 55, 46-47) The Complaint allegation 4(d) on interrogation referred only to "employees" (A. 177), and Respondent's motion to make it more definite and certain prior to the hearing had been denied. (A. 185, 186) Respondent's motion to sequester the witnesses to avoid the witnesses hearing one another's testimony was overruled. (A. 4-5) After the witnesses heard the attacks by Respondent's counsel on the insufficiency of this phase of the case (A. 30-31, 41-42), the third and fourth employee witnesses who had sat through the proceedings and heard it all gave the testimony on which the Trial Examiner now relies. Although the Trial Examiner found this alleged interrogation a violation of Section 8(a)(1) (A. 234), the Board held it would not assert jurisdiction on this interrogation issue; and therefore, its relevance here is only on the point of whether it constitutes, along with countervailing evidence including Respondent's denial of knowledge, substantial evidence to show Respondent had sufficient knowledge of facts to establish an 8(a)(4) violation.

claims that Scrivener said, "Hey, Bud * * * Did you guys meet with the Labor Board last night?" and "They sure don't talk much, do they?" (A. 65) Wilson claims nothing else was said at that time, other than his own "yes" to the first question. Wilson claims that later in the day Scrivener said to him [Wilson] in the presence of Don Cockrum,[14] "You said you met with the Labor man last night?", to which Wilson replied, "Till about 11 or 11:30." Respondent is supposed to have said again, "That old boy sure don't tell you nothing", to which Wilson is supposed to have replied, "No, Bob, he's a German." (A. 65) Wilson did not consider this conversation coercive, and he admits that at *no time* since March 25, 1968, when he received a letter from Respondent (Respondent's Exh. No. 2, A. 3-4, 192) had Respondent indicated any kind of action would be taken against him or anyone else for union activities or for talking to a Board agent, and at no time had Respondent ever asked him or any other employee to tell any particular thing to any Labor Board agent. (A. 75) And when Wilson testified about why he and the others were laid off on April 18, in response to the General Counsel's question as to how this came about, Wilson stated, "No work is what we were told", and did not testify it was for any unlawful reason. (A. 65) Wilson testified he was recalled on May 4, and worked thereafter until May 10, when he went to work for Midwest Electric Company (A. 74-75).[15]

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14. Don Cockrum did not corroborate Wilson's testimony. (A. 118) Nor does the statement taken from Don Cockrum on May 1, 1968. (A. 188)

15. Although Wilson volunteered that he was laid off by Respondent on May 10 (A. 74-75), there is no such allegation in the Complaint. (A. 175-180) The Trial Examiner rejected Respondent's contention that the May 10 separation of Wilson could not be contended since it was not raised in the Complaint (A. 238), and the testimony of Scrivener that Wilson just failed to show up after May 10, and was therefore considered as having voluntarily quit his employment. (A. 139) Scrivener positively testified that Wilson was not laid off on May 10, or thereafter. (A. 139)

Sanders' testimony is that Scrivener came up to him and a group of employees and said "Did you boys find out anything last night", to which Sanders replied, "Not that I know of, Bob", and Sanders says "that was all we said." (A. 80) No other employee from the group supposedly present appeared to corroborate Sanders' testimony in this regard.[16] Sanders admitted that Scrivener told him this layoff was made because the work was slack (A. 80), and Sanders could not deny this was true. (A. 84) Although Sanders was never recalled (A. 81), he admits he is a man 59 years of age, and he has a job presently with another electrical contractor which does not require as much physical labor. (A. 81) Upon being foreclosed from further cross-examination of Sanders on the point, Respondent offered to prove that if Sanders were permitted to answer, he would admit that he had told Scrivener since his layoff that the job he presently had was better for him and he would not take any reemployment offer for that reason. (A. 82-83) Sanders admits that Scrivener has never stated that he was going to take any action against him for talking to a Labor Board man or anything like that. (A. 83) Sanders admits he went to work for Roper Electric Company three or four days after April 18, and he has worked there "continuously since." (A. 84)

The only other employees who testified stated that Scrivener had never interrogated them concerning any statements they may have given the Labor Board investigator, including William Cockrum (A. 55); Don Cockrum (A. 118), and Wesley Smith. (A. 46-47) The Trial Examiner did not permit Smith to answer questions as to whether he knew of Scrivener having talked to any other employees about any statements they may have given the Labor Board investigator (A. 47), or as to whether he

16. The other three employees who testified denied any statements by Scrivener in their presence concerning employees having talked to a Labor Board agent. (A. 46-47, 55, 118)

claimed that Respondent "ever took any action with reference to [Smith] for talking to any Labor Board man or anything like that?" (A. 30-31)

Smith was recalled May 4 and worked ever since. (A. 29, 30) Don Cockrum was recalled April 30. (A. 100)[17] Although the Trial Examiner was not satisfied that Wilson and Sanders had been adequately reinstated, though he found they were recalled on May 4, 1970, he expressed no similar dissatisfaction concerning Don Cockrum. (A. 239)

(4) Board Agent's Initiation of Charge and Complaint.

The record shows that NLRB Agent Frerking took a statement from Don Cockrum, at least, on May 1, 1968 (A. 188), designed to support a charge of a violation under the Board's theory of 8(a)(4) in connection with the April 18 layoffs. The record also shows that no charge under 8(a)(4) was pending at that time, since the 8(a)(4) charge was first filed on May 13, 1968 (A. 173), only four days prior to issuance of the Complaint. (A. 180) Since the Board agent investigated the 8(a)(4) issues before the filing of any charge on those issues, the Company contends that the NLRB agent unlawfully initiated the filing of the 8(a)(4) charge and the Complaint based thereon in violation of Section 10(b) of the Act. (A. 271)

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17. Petitioner's Brief erroneously states it was June before Don Cockrum was recalled. (Pet.Br., p. 5, note 3) Don Cockrum admits he was recalled April 30. (A. 100) There may have been a break in his employment thereafter, since he testifies he went back to work for Respondent again three weeks prior to the hearing of June 25 (A. 100), but the complaint does not allege any wrongful act of Respondent between April 30 and June, and there is no evidence that he was laid off or discharged between April 30 and June. (A. 175-180) It must be concluded, therefore, that any separation of his employment after April 30 was not claimed to result from wrongful action of Respondent.

SUMMARY OF ARGUMENT

The Eighth Circuit Court's Decision should be affirmed because it properly construed the Act.

The word "testimony" has long been understood by lawyers, Courts, and legislatures to refer to oral evidence given by witnesses in a formal trial or hearing where all parties are present and have an opportunity to cross-examine. In enacting Section 8(a)(4) of the Act, protecting an employee from discrimination "because he has * * * given *testimony* under this Act", Congress obviously had this long understood meaning of "testimony" in mind. If Congress had sought to protect "statements" or "affidavits" or "those giving information to a Board investigator" under the Act, then Congress would have used such words, and not the legal term, "testimony."

That Congress purposely chose the word "testimony" in Section 8(a)(4), and intended it to mean oral evidence given in a formal hearing subject to cross-examination, is also shown by viewing the entire Act and the repeated use of the word "testimony" in that sense. It is on the "preponderance of the *testimony*" that the Trial Examiners and Board are required to decide unfair labor practice cases, under Section 10(c). Before such hearings are held, a charge, complaint, and notice of hearing must be filed and served on the accused party, under Section 10(b). The accused party "shall have the right to file an answer * * *, to appear in person * * * and *give testimony* at the place and time fixed in the complaint." The hearing is required to be conducted under the rules of procedure and evidence applicable in Federal District Courts. "Witnesses shall be examined orally under oath * * *." Board Rule 102.30.

The dangers of employer retaliation against employees for giving statements to Board agents is more imagined

than real, since such statements are declared by present law to be held in strict secrecy and are privileged from disclosure, until the witness has testified. By the time the employer has an opportunity to obtain it for cross-examination under the "Jencks rule", the protection of 8(a)(4) to those giving "testimony under this Act" has already attached. Until then, the secrecy provides sufficient protection. But in any event Congress has enacted criminal penalties under 29 U.S.C. § 162 subjecting to a $5000 fine and a year in jail, or both, anyone who shall "wilfully resist, prevent, impede, or interfere with any member of the Board of any of its agents or agencies in the performance of their duties" under the Act. Congress has thus forcefully protected the Board from the imagined dangers. Congress could have included such language under Section 8(a)(4) of the Act, but did not choose to do so, perhaps because Congress did not want the Board to be its own discriminatee, prosecutor, and judge. But whatever reason Congress had, its language in Section 8(a)(4) is clear and explicit; and if Petitioner desires further legislation, its requests should be addressed to Congress.

There is no substantial evidence on the record as a whole that Respondent was motivated by "anti-labor Board" discrimination when laying off its employees on April 18.

The Eighth Circuit Court's Decision should be affirmed additionally on the other grounds raised by the Company in the Eighth Circuit.

ARGUMENT

I. The Eighth Circuit Court's Decision Should Be Affirmed Because "Testimony under This Act" in Section 8(a)(4) Plainly Does Not Include Pre-Complaint Statements Which Are Taken Without Notice to the Employer and Without His Knowledge and Which Are Confidential until the Person Giving the Statement Has Testified in a Formal Hearing.

The Eighth Circuit Court[18] properly construed Section 8(a)(4) of the Act. Congress did not include pre-complaint statements within the meaning of that statute's protection for "testimony under this Act."[19]

The word "testimony", as used by lawyers and legislators, means oral evidence given by a witness in a formal trial or hearing where all parties are present and have an opportunity to cross-examine and present "testimony" of their own.[20] A "statement" or "affidavit" cannot be equated to "testimony" since the written statement or affidavit is not admissible in a trial or hearing without some authenticating testimony of a witness who appears and

18. 435 F.2d 1296.

19. *Hoover Design Corp.* v. *NLRB*, 402 F.2d 987 (6th Cir. 1968); *NLRB* v. *Ritchie Mfg. Co.*, 354 F.2d 90 (8th Cir. 1966); *NLRB* v. *American White Cross Laboratories, Inc.*, 160 F.2d 75, 76 (2nd Cir. 1947); *Ogle Protective Service*, 149 NLRB 545, 556 (1964).

20. *Ensign* v. *Pennsylvania*, 227 U.S. 592, 599 (1913); *Optner* v. *United States*, 13 F.2d 11, 13 (6th Cir. 1926); *State* v. *Schifsky*, 243 Minn. 533, 69 N.W.2d 89, 93 (1955), holding that wife's out-of-court declaration was not "testimony" within meaning of statute precluding one spouse from giving testimony against the other without his consent; *Moore* v. *Commonwealth*, 288 Ky. 242, 156 S.W.2d 115, 117 (1941), holding "testimony" to mean "words uttered by witnesses in court;" *Sledge* v. *Singley*, 139 Ala. 346, 37 So. 98, 99 (1903); *Whisler* v. *Whisler*, 147 Iowa 712, 89 N.W. 1110, 1111 (1902); *In re Seigle's Estate*, 117 Misc. 642, 31 N.Y.S.2d 623, 626 (1941).

submits himself to cross-examination.[21] "Testimony" does not include the written sworn schedules filed in bankruptcy court by the bankrupt. *Ensign* v. *Pennsylvania*, 227 U.S. 592, 599 (1913). When Congress enacted Section 8(a)(4) protecting employees from discrimination because of their "testimony under this Act," Congress was obviously aware of the meaning of "testimony" in the Courts. Being aware of that meaning, Congress would have used some other word if it had not intended "testimony" as long understood and defined by the Courts. To impute to Congress any other intended meaning of this word "would do violence to common intelligence."[22]

In looking at the Act in its entirety, and the Rules, Regulations and Statements of Procedure published by the Board thereunder, it can be seen that neither Congress nor the Board has intended "testimony" to apply to written statements given to Board agents in pre-complaint investigation. See excerpts from the Act and the Board's Rules, Regulations and Statements of Procedure attached as Appendix A. hereto.

The Board's powers to prevent unfair labor practices are set out in Section 10 of the Act. Section 10(b) provides that: the Board has power to issue a complaint and notice of hearing only whenever it is charged that a person has committed an unfair labor practice and only in respect to those charges; the person complained of *"shall have the right to file an answer* to the original or amended complaint and *to appear* in person or otherwise and *give testimony*

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21. *Emery* v. *Orleans Levee Board*, 11 So.2d 652, 655 (La. App. 1943); *Shepard* v. *Board of Supervisors of San Joaquin County*, 137 Cal.App. 421, 30 P.2d 578, 581 (1934). The main reason that an affidavit or written statement is not admissible in evidence under the hearsay rule, is that otherwise the right of the parties to cross-examine the out-of-court declarant would be frustrated. McCormick, *Law of Evidence* (West Publishing Co. 1954), p. 458.

22. *Edelstein* v. *United States*, 149 Fed. 636, 640 (8th Cir. 1906).

at the place and time fixed in the complaint;" the Board has discretion to permit other persons to intervene "in the said proceeding and to *present testimony*;" and "such proceeding shall, so far as practicable, be conducted *in accordance with the rules of evidence applicable in the district courts* of the United States *under the rules of civil procedure for the district courts* of the United States * * *." Consistent with the rules of evidence and procedure applicable in federal district courts, the Board's Rules require that witnesses "*shall be examined orally under oath*, except that for good cause shown *after the issuance of a complaint*, *testimony* may be taken by deposition." Board Rule 102.30.[23] The Board has alos recognized that at the unfair labor practice hearing, all parties must be accorded the right to call, examine and cross-examine witnesses under the rules of evidence and procedure applicable in federal district courts. Board Statement of Procedure 101.10.

It is on the basis of the "testimony" presented at the Board hearing that the Trial Examiner, and the Board, render their decisions in unfair labor practice cases under the Act. Section 10(c) provides that: the "testimony taken" at the unfair labor practice hearing "shall be reduced to writing and filed with the Board;" the Board may thereafter in its discretion, *but only upon notice*, "take further testimony;" and the Board must render its decision "upon the preponderance of the *testimony* taken" in the Board hearings. It may not, of course, decide a case on the basis of pre-complaint statements which are excluded from admissibility under the hearsay rule.

Other provisions of the Act where formal hearings upon due notice are provided for, wherein "testimony" under

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23. If depositions are taken, "the officer designated to take such deposition shall permit the witness to be examined and cross-examined under oath by all the parties appearing, and his testimony shall be reduced to typewriting" and all parties have a right to object to questions asked and have their objections reflected in the transcript. Board Rule 102.30(c).

the Act may be presented, could be cited[24] and discussed. But the above provisions of Section 10 plainly show that Congress required "testimony" to be presented in formal Board hearings where all parties had a right to appear and participate upon due notice. This "testimony" must be presented under the rules of evidence and procedure applicable in federal district courts, and the Board's Rule 102.30 recognizes that such "testimony" must be presented through witnesses who "shall be examined orally under oath" with the right of other parties guaranteed under the Act's Section 10(b), to be present, to make objections, cross-examine, and present other "testimony". It is obvious from reading the Act as a whole, that Congress referred to this oral examination of witnesses under oath, at formal hearings where all parties are entitled to be present and participate under procedures recognized for federal district court trials, when it protected "testimony under this Act" in Section 8(a)(4). It is equally obvious that Congress did not intend to encompass within the meaning of "testimony under this Act" the ex parte, precomplaint statements taken by Board agents investigating a charge before any complaint and notice of hearing has been filed.

The scheme of the Act itself shows that in two specific ways Congress deemed an employee's open identification as a participant in Board proceedings required protection: (1) where the employee filed a "charge," and (2) where the employee gave "testimony" under the Act. In both instances the employee's identity as a participant against the employer could not be concealed. If the employee files a charge, that charge must be signed by the employee, and

24. See Section 9(c)(1) providing for representation hearings "upon due notice"; Section 10(d) which requires the Board to file for injunctive relief in the federal district courts on certain unfair labor practice charges, and in such court proceedings guarantees the right of any person involved in the charge "to appear by counsel and present any relevant *testimony*."

a copy of that charge served on the employer. Section 10(b) of Act; Board Rule 102.9-102.14; Board Statement of Procedure 101.2. If the employee gives "testimony" in a formal Board hearing, the employer has a right to attend such hearing, cross-examine the employee, and otherwise participate in that proceeding. Section 10(b) of the Act; Board Rules 102.15-102.19; Board Statement of Procedure 101.10. In either case, the employee filing the charge or giving testimony in a Board hearing is openly and directly confronting his employer in an adversary proceeding, and obviously Congress enacted Section 8(a)(4) to protect the employee from discrimination by the employer resulting from such confrontation.

The question here is whether the employees named in the Union's charge of May 13, 1968 (A. 173), had given "testimony under this Act," at the time of the alleged discrimination on April 18, 1968. The charge initiating this proceeding does not claim that the employees here involved had filed any charges under the Act, and thus there is no claim here on that theory.[25] The charge was that the

25. The Board has no jurisdiction to file a complaint against the company, under Section 10(b) of the Act, except *"whenever it is charged"* the company committed a violation. When a charge is filed, then the Board has the power to issue and cause to be served on the company "a complaint stating the charges in that respect." *NLRB* v. *Shipbuilding Local 22*, 391 U.S. 418, 424 (1968); *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 238 (1967). Since the charge (A. 173) does not allege discrimination by reason of any "charges" having been filed by the employees in question, the Board would have had no jurisdiction to have so contended in the complaint herein, and the complaint should not be so construed. [A. 177, paragraphs 5(c) and (e)] The theory of the Trial Examiner for his finding of an 8(a)(4) violation because charges were filed for these employees (A. 236-238) is completely outside the Board's jurisdiction under the complaint and charges herein. (A. 173, 177) Those findings are also completely without any supporting evidence whatever that anyone filed the charges "as agents for the employees," and the Trial Examiner's theory in this respect is gross speculation and conjecture unsupported by substantial evidence upon the record as a whole. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951). In any event, the question on which certiorari was granted herein does not encompass the Trial Examiner's theory referred to.

employees were discriminated against "because they gave testimony in the matter of Board Case No. 17-CA-3519". (A. 173) The record is undisputed that no formal hearing had ever been held at the time of the alleged discrimination, so the Petition requests this court to *construe* 8(a)(4) and the charge herein as meaning "written sworn statements given a Board investigator in pre-complaint investigation." Such construction would, for the above reasons, constitute a complete judicial amendment of the statute in question to make it say something entirely different from what Congress obviously intended. Such a construction would make the word "testimony" mean something different than its recognized meaning in the Courts under the federal rules of civil procedure and the rules of evidence there employed, which Congress plainly required to be applied to Board proceedings under Section 10(b) of the Act.

The Board seeks judicial legislation to extend the Section 8(a)(4) protection beyond the two types of situations expressly mentioned therein, where the employee openly confronts his employer as discussed above. The Board claims that the 8(a)(4) protection must be extended to a third group of employees, those who have NOT filed charges or given testimony in a formal Board hearing, but who have given "written statements to Board agents." (Pet.Brief, p. 10).[26] The Board contends that protection

26. Contrary to Petitioner's contention, that all four employees here involved gave "written, sworn statements" to the Board (Pet.Brief, p. 4), three of those employees testified only that they gave "statements" or were "interviewed." (Smith, A. 26-27; Wilson, A. 64; and Sanders, A. 79-80) Only Don Cockrum testified that he gave a written, sworn statement (A. 88-89), and only his statement was introduced and received in evidence. (General Counsel's Exhibit No. 4, A. 92, 187) All four employees' testimony does indicate, however, that the statements allegedly given by them were confidential and outside the presence of the Company representatives, and without any notice to the employer that they were being made. In fact the statements, if made, were completely unnecessary under the Board's Statements of Procedure, 101.4, which gives the Regional Director discretion to

under Section 8(a)(4) should be found for employees "irrespective of the nature of the information they give to the Board or the manner in which they do so," (Pet.Brief, p. 11) and *"irrespective of whether the employee filed a charge or actually gave testimony* at a formal hearing." (Pet.Brief, p. 12) Congress did *not* so provide, as is in effect admitted by said contentions.

Petitioner's contention that employees might be reluctant to give statements to Board investigators if 8(a)(4) is not construed to express a protection from employer retaliation as a result of such cooperation overlooks three points. First, Congress did not so provide. Second, such investigative statements are held in strict confidence, and are taken under strict secrecy.[27] The only circumstance in which the employer may learn of the contents of such statements would be to cross-examine the employee (the Jencks rule) after the employee has already testified in the formal Board hearing.[28] At that point the Eighth Circuit's interpretation of 8(a)(4) affords protection to the employee since he has given "testimony under this Act" in the formal Board hearing. Until that stage, no additional protection is needed since the secrecy of the statement should be enough. Board Rule 102.117(b) provides that statements will be "held confidential and are not matters of official record or available to public inspection * * *." Third, in Section 12 of the Act, Congress has

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conduct only such investigation as necessary under the circumstances. Prior to the taking of these alleged statements, the Company had already shown the Board that it was not subject to the Board's jurisdictional standards (A. 3-4, 190), a fact now admitted. (A. 274-275) (Pet.Brief, p. 6, note 4)

27. *Intertype Co.* v. *NLRB*, 401 F.2d 41, 45 (4th Cir. 1968), cert.den., 393 U.S. 1049 (1969); *NLRB* v. *Golden Age Beverage Co.*, 415 F.2d 26, 34 (5th Cir. 1969); Board Rule 102.117(b). See also 5 U.S.C. § 552 (b)(7), which exempts federal agency investigative files from disclosure requirements of Administrative Procedure Act.

28. 18 U.S.C. § 3500; Board Rules 102.117, 102.118.

granted forceful protection against the type of interference which Petitioner imagines, since Congress has provided:

> "Any person who shall wilfully resist, prevent, impede, or interfere with any member of the Board of any of its agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than $5,000 or by imprisonment for not more than one year, or both."[29]

Congress did not choose to make the protection under Section 8(a)(4) as broad as this criminal statute. Perhaps Congress felt it would be inappropriate to let the Board be the prosecutor, judge, and jury in a case where it also claimed to be the discriminatee.

Petitioner erects imaginary circumstances, not shown by this record, and then claims that these imaginary circumstances make it urgent that the Eighth Circuit's decision be reversed. However, a review of this record under the substantial evidence rule as the Company is entitled to have under *Universal Camera Corp* v. *NLRB*, 340 U.S. 474 (1951) will show that Petitioner's imagined circumstances do not exist in this case. All that can be shown here is the fact that the employees met with the Board agent. That this is not a sufficient basis for showing a violation of 8(a)(4), even under current Board law, is shown by *Aerovox Corp. of Myrtle Beach, S.C.*, 172 NLRB No. 97, 68 LRRM 1444, 1447 (1968) holding that the mere fact an employee has "testified" and was discharged thereafter does not support a finding of violation under 8(a)(4). And the Board has held that to prove an 8(a)(4) violation, over the employer's claim that the layoff was for economic reasons as here, the Board must present proof that the employer was motivated by the fact that the employee's testimony in the Board hearing was *adverse* to the em-

29. 29 U.S.C. § 162.

ployer. See *Liberty Sportswear Co.*, 183 NLRB No. 127, 74 LRRM 1459, 1461, 1462 (1970).

The Board's decision herein failed to discuss or analyze the evidence to support an 8(a)(4) finding, and the Trial Examiner's Decision (A. 234-235) relied to a great extent on the finding of anti-union motivation he deemed violative of 8(a)(3). The Board decision (A. 274-275) declined to assert jurisdiction on any violation other than 8(a)(4), and any facts supporting the discarded 8(a)(3) theory cannot be relied upon to support the present 8(a)(4) theory. Just because a company was anti-union, it would not follow that it was also "anti-Labor Board". There is absolutely no evidence in this record that the present Company harbored any unexpressed, unmanifested retaliatory attitude toward the Labor Board of the type that would have to be shown to make out a case on Petitioner's theory. In fact, the record shows, as the Trial Examiner found, that the Company had been advised (correctly) that the Board had no jurisdiction over the employer on the charges then pending. (A. 235, 236) It would be entirely inconsistent with that finding to also find that the Company would necessarily retaliate against its employees for meeting with a Board agent who had no authority over the Company. Under the substantial evidence rule, the Eighth Circuit was not required to give the Trial Examiner's findings "more weight than in reason and in the light of judicial experience they deserve." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 496. The Eighth Circuit was required to take into account the evidence which fairly detracts from the Trial Examiner's findings. *Id.*, at page 488. Enforcement is properly denied, when, as in this record, it is shown that the Trial Examiner's findings are based upon mere speculation, conjecture, and surmise, instead of competent evidence.

The Board's Decision, in failing to analyze its own 8(a)(4) precedent discussed above, and other relevant precedent, and in failing entirely to review the evidence to see if an 8(a)(4) theory could be supported after discarding jurisdiction of the other claimed violations, clearly failed to afford the judicious type of review guaranteed to the Company under the Administrative Procedure Act. For this additional reason, it was appropriate for the Eighth Circuit to deny enforcement. *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167-169 (1962); *NLRB* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, 442-443 (1965); *Carnation Co.* v. *NLRB*, 429 F.2d 1130 (9th Cir. 1970); *Burinskas* v. *NLRB*, 357 F.2d 822, 827 (D.C. Cir. 1966); *NLRB* v. *WGOK*, 384 F.2d 500, 503 (5th Cir. 1967).

II. The Eighth Circuit Court's Decision Should Also Be Affirmed for the Other Reasons Urged by the Company That Enforcement of the Board's Decision Be Denied.

Although certiorari was not granted on these issues which were not reached by the Eighth Circuit, we mention these points because we believe they plainly call for affirmance of the Eighth Circuit's Decision. We deem it especially important to mention these points since the Petitioner's Brief, in conclusion, requests this Court to remand this case to the Eighth Circuit "with directions to enforce the Board's order." (Pet.Brief, p. 20) Such request is clearly inappropriate, in view of the following points which call for the Board's Decision to be denied enforcement:

1. The Board failed to show by substantial evidence upon the record as a whole that the Company's business was connected or related with Commerce as defined under Section 2(6) and (7) of the Act in any manner other than something of a *de minimis* nature. *NLRB* v. *Fainblatt*, 306 U.S. 601, 607 (1939); *Hiatt* v. *Schlect*, 400 F.2d 875 (9th Cir. 1968); *Weber* v. *Hiatt*, 424 F.2d 1366 (9th Cir. 1970), cert. den., 400 U.S. 879 (1970); *NLRB* v. *Idaho-*

Maryland Mines Corp., 98 F.2d 129, 131 (9th Cir. 1938). The necessary showing was certainly not made by the double-hearsay, *ex parte* investigation, projections, and estimates made by Mr. Griffin on behalf of General Counsel. See facts at pages 6-8, *supra*. A substantial impact on commerce is not shown by the local purchase of 6 light bulbs, 2 pair of pliers, "some" couplings and conduit which may "assumptively" have been manufactured outside the State at some unknown point in time.

2. The present proceedings, involving 8(a)(4), were initiated by investigation conducted by a Board agent in violation of Section 10(b) of the Act which authorizes the Board to investigate a particular unfair labor practice only "whenever it is charged" that such violation has occurred. See facts at page 14, *supra*. "The Board cannot start a proceeding without such charge being filed with it." *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967). "The Board should be an impartial administrator and must ascertain if there were unfair labor practices *as charged*." *NLRB* v. *Hopwood Retinning Co.*, 98 F.2d 97, 101 (2d Cir. 1938) (emphasis added). The Board's Decision herein (A. 274-275) establishes that there was no charge pending on May 1, 1968 (when the Board agent conducted the investigation now referred to, see p. 14 *supra*), of a type on which the Board could properly assert jurisdiction. The Board Decision itself establishes that the presently claimed violations of 8(a)(4), initiated by the Board agent's May 1 investigation, are of a completely different type than the original charges herein, which the Board has totally dismissed. Under such circumstances, where the Board "gets so completely outside of the situation which gave rise to the charge that it may be said to be initiating the proceeding on its own motion, then the complaint shall fall as not supported by the charge." *NLRB* v. *Kohler Co.*, 220 F.2d 3, 7 (7th Cir. 1955). The

charge of May 13 which is the entire basis for the present proceeding at this point was clearly initiated by the Board's investigation of May 1, and thus the present complaint should be dismissed as outside the Board's jurisdiction under Section 10(b). See also *Hercules Powder Co.* v. *NLRB*, 297 F.2d 424, 433 (5th Cir. 1961).

3. Section 14(c)(1)[30] of the Act granted the Board authority to erect jurisdictional standards to decline to assert jurisdiction over labor disputes involving any "class or category of employers" for the reasons which the Board's decision declines to assert jurisdiction with respect to Sections 8(a) (1), (3), and (5). Those same standards made it impossible for the Company to obtain protection from the illegal picketing of the Union which caused lack of sufficient employment to avoid the layoffs in question. See note 11, *supra*. The employer here involved had been declared by the published jurisdictional standards of the Board to be in a class "too small to protect." Now, the Board turns around and says he is not "too small to prosecute!" Such arbitrary, capricious, and discriminatory application of its jurisdictional standards so as to deprive Respondent from having access to Board process for his protection but at the same time to prosecute him all the way to the United States Supreme Court is a rather evident violation of 5 U.S.C. § 706 (2) (A), (B), (C), (D),[31] and the due process clause of the Fifth Amendment of the United States Constitution. If the Board is permitted to depart from its jurisdictional standards here, to prosecute Respondent, but at the same time to preclude Respondent from access to Board processes for his own protection, this clearly violates the policy of the Act. *Nash* v. *Florida Industrial Commission*, 389 U.S. 235 (1967). The Board

30. 29 U.S.C. § 164(c)(1).

31. It also violates Section 14(c)(1) of the Act for the Board to utilize its jurisdictional standards as a means of taking away substantive rights of small employers under the Act, but still prosecute them thereunder.

has not satisfactorily explained its discriminatory application of its jurisdictional standards here. *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167-169 (1962); *Carnation Co.* v. *NLRB*, 429 F.2d 1130 (9th Cir. 1970).

4. The theory of the Trial Examiner and Board on the violation now alleged is completely unsupported by substantial evidence on the record as a whole. See facts at pp. 8-14, *supra*. The conjecture and speculation of the Trial Examiner and his total refusal to consider the evidence favorable to the Company should be rejected. A rational analysis of the record shows that enforcement was properly denied in this case. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951); *Aerovox Corp. of Myrtle Beach, S.C.*, 172 NLRB No. 97, 68 LRRM 1444, 1447 (1968); *Liberty Sportswear Co.*, 183 NLRB No. 127, 74 LRRM 1459, 1461, 1462 (1970); *Standard Electric Co.* v. *NLRB*, 387 F.2d 717 (5th Cir. 1968); *NLRB* v. *Selwyn Shoe Mfg. Co.*, 428 F.2d 217 (8th Cir. 1970).

CONCLUSION

The Decision of the United States Court of Appeals for the Eighth Circuit, 435 F.2d 1296, should be affirmed. It properly construed Section 8(a)(4) of the Act, and properly denied enforcement of the Board's Decision herein, for all of the reasons mentioned above.

Respectfully submitted,

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December 22, 1971

APPENDIX A

The following are excerpts from the statutes or rules referred to:

ADMINISTRATIVE PROCEDURE ACT, 60 Stat. 243, 80 Stat. 393, 5 U.S.C. § 706, provides in part:

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning of applicability of the terms of an agency action. The reviewing court shall— * * * (2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

NATIONAL LABOR RELATIONS ACT, 61 Stat. 136, 73 Stat. 519, 29 U.S.C., 151 et seq., provides in part:

"Sec. 2. When used in this Act— * * *

"(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other

Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

* * *

"Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint; * * *. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district court of the United States under the rules of civil

procedure for the district courts of the United States adopted by the Supreme Court of the United States * * *."

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. * * *"

"(1) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of Section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable

cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. * * * Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: * * *."

* * *

"Sec. 12. Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than $5,000 or by imprisonment for not more than one year, or both."

* * *

"Sec. 14. (c) (1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: * * *."

RULES AND REGULATIONS OF NATIONAL LABOR RELATIONS BOARD, 29 C.F.R., provides in part:

"Sec. 102.9 *Who may file; withdrawal and dismissal.*—A charge that any person has engaged in or is engaging in any unfair labor practice affecting commerce may be made by any person. * * * Upon withdrawal of any charge, any complaint based thereon shall be dismissed by the regional director issuing the complaint, the trial examiner designated to conduct the hearing, or the Board."

* * *

"Sec. 102.15 *When and by whom issued; contents; service.*—After a charge has been filed, if it appears to the regional director that formal proceedings in respect thereto should be instituted, he shall issue and cause to be served on all the other parties a formal complaint in the name of the Board stating the unfair labor practices and containing a notice of hearing before a trial examiner at a place therein fixed and at a time not less than 10 days after the service of the complaint. The complaint shall contain (1) a clear and concise statement of the facts upon which assertion of jurisdiction by the Board is predicated, and (2) a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed."

* * *

"Sec. 102.30 *Examination of witnesses; depositions.*—Witnesses shall be examined orally under oath, except that for good cause shown after the issuance of a complaint, testimony may be taken by deposition."

STATEMENTS OF PROCEDURE published by the Board include the following:

"Sec. 101.2 *Initiation of unfair labor practice cases.*—The investigation of an alleged violation of the National Labor Relations Act is initiated by the filing of a charge, which must be in writing and signed, and must either be notarized or must contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief. The charge is filed with the regional director for the region in which the alleged violations have occurred or are occurring. A blank form for filing such charge is supplied by the regional office upon request. The charge contains the name and address of the person against whom the charge is made and a statement of the facts constituting the alleged unfair labor practices."

* * *

"Sec. 101.4 *Investigation of charges.*—When the charge is received in the regional office it is filed, docketed, and assigned a case number. * * * As part of the investigation hereinafter mentioned, the person against whom the charge is filed, hereinafter called the respondent, is asked to submit a statement of his position in respect to the allegations. The case is assigned for investigation to a member of the field staff, who interviews representatives of the parties and other persons who have knowledge as to the charges, as is deemed necessary. * * * The regional director may in his discretion dispense with any portion of the investigation described in this section as appears necessary to him in consideration of such factors as the amount of time necessary to complete a full investigation, the nature of the proceeding, and the public interest. * * *"

* * *

Section 101.10 *Hearings.*—(a) Except in extraordinary situations the hearing is open to the public and usually conducted in the region where the charge originated. A duly designated trial examiner presides over the hearing. The Government's case is conducted by an attorney attached to the Board's regional office, who has the responsibility of presenting the evidence in support of the complaint. The rules of evidence applicable in the district courts of the United States under the Rules of Civil Procedure adopted by the Supreme Court are, so far as practicable, controlling. Counsel for the general counsel, all parties to the proceeding, and the trial examiner have the power to call, examine, and cross-examine witnesses and to introduce evidence into the record. * * *"

NATIONAL LABOR RELATIONS BOARD v. SCRIVENER, DBA AA ELECTRIC CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 70-267. Argued January 12, 1972—Decided February 23, 1972

Employer's discharge of employees because they gave written sworn statements to a National Labor Relations Board field examiner investigating an unfair labor practice charge filed against the employer, but who had neither filed the charge nor testified at a formal hearing on the charge, constituted a violation of § 8 (a) (4) of the National Labor Relations Act. Pp. 121–125.

435 F. 2d 1296, reversed and remanded.

BLACKMUN, J., delivered the opinion for a unanimous Court.

William Terry Bray argued the cause for petitioner. With him on the brief were *Solicitor General Griswold*, *Peter G. Nash*, *Norton J. Come*, and *Paul J. Spielberg*.

Donald W. Jones argued the cause and filed a brief for respondent.

William B. Barton and *Harry J. Lambeth* filed a brief for Associated Builders & Contractors, Inc., as *amicus curiae*.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Section 8 of the National Labor Relations Act, as amended, 61 Stat. 140, 29 U. S. C. § 158, provides:

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

. . . . .